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# LAW AND LAWYERS: THE ROAD TO REFORM

KENNETH W. STARR\*

MY reflections this evening, which focus on our nation's justice system, reflect broader social concerns, going to the basic structure of American institutions and the precipitous decline in trust reposed in those institutions.

Let me not mince words. As a people, Americans have become highly distrustful and disrespectful of institutions, ranging from the basic social unit of the traditional nuclear family to churches and synagogues, schools and universities, and in this election season, of government itself. Courts—the justice system—are no exception to this powerful trend. In my view, the trend is broad-based and deep enough to be profoundly disturbing.

What explains this trend of distrust and disrespect? Part of the answer, I believe, lies in America's inherent, culturally rooted suspicion of power. We are, at bottom, an anti-power society. We are a revolutionary society. Unlike the people of Canada, who peacefully separated from Britain,<sup>1</sup> we in the United States chose the path of violence.<sup>2</sup> We appealed to a higher authority. We appealed to Nature's God, to natural law, and ultimately, to the natural or inalienable rights, in Jefferson's words, of the individual to be free to make his or her own destiny.<sup>3</sup> That in large part was the American story that unfolded after the Revolution, especially the conquering of the frontier and expanding westward to the Pacific and beyond. We even hear this in our contemporary music, such as the country and western song (which I hear a lot in Little Rock) called "Independence Day."<sup>4</sup> The

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\* Judge Starr is currently the special prosecutor for the Whitewater investigation. Prior to this, Judge Starr served as Solicitor General of the United States. He also has served as a United States Circuit Judge for the District of Columbia and as Counselor to United States Attorney William French Smith. Judge Starr served as law clerk to United States Court of Appeals Judge David W. Dyer and to Chief Justice of the Supreme Court Warren E. Burger. These remarks were presented as part of the John Sonnet Lecture Series at Fordham University School of Law on November 3, 1994. The remarks have been lightly edited and footnotes have been added, but they retain the form and style of the oral remarks.

1. See generally Anne-Marie Mawhiney, *Towards Aboriginal Self-Government: Relations Between Status Indian Peoples and the Government of Canada 1969-1984*, at 23-26 (1994) (discussing the relationship between Canada and Britain); Carl Wittke, *A History of Canada* (rev. ed. 1933) (explaining the influence of France and Britain on Canada's history).

2. See *American Violence: A Documentary History 13-18* (Richard Hofstadter & Michael Wallace eds., 1970); Charles A. Beard & Mary R. Beard, *A Basic History of the United States 102-19* (1944).

3. See Claude G. Bowers, *Jefferson and the American Way of Life, in The Heritage of Jefferson* 13, 13-15 (Claude G. Bowers et al. eds., 1944); Dumas Malone, *Jefferson and the Rights of Man* 153 (1951); David N. Mayer, *The Constitutional Thoughts of Thomas Jefferson* 75-79 (1994).

4. Martina McBride, *Independence Day* (BMG).

song has very little to do with the Fourth of July and much to do with individuality and autonomy.

That is another part of the answer of our cultural distrust of institutions. Culturally, we believe, above all, in the individual. The rights of the individual are of the highest order in our constellation of values. Thus, we as a people are inherently suspicious when government intrudes into the sphere of individuality and autonomy. This is an attribute that unites the ACLU in Greenwich Village and Sagebrush Rebellion leaders from the far West. Culturally, we favor not society, but the individual. We root for the little guy, the self-made woman, the self-made man. We talk about our freedom to define ourselves, to do what we want to do, and to be all that we can be, including marching to the beat of our own drummer. Cowboys, Lone Rangers, Henry David Thoreaus, Huckleberry Finns—these are our historic, traditional cultural icons. “Up the Organization,” “Do Your Own Thing,” “I Gotta Be Me”—these are our individualistic mottos and mantras.

The third reason for our growing distrust of institutions is scandal. Increasingly, we think our institutions lie to us and deceive us. Watergate was a cultural and political watershed in this respect. Since Watergate, we as a people are prepared to believe the worst. It was one thing for President Eisenhower to lie about the United States sending spy planes over the then Soviet Union, although it cannot be doubted that the shooting down of Gary Francis Powers' U-2 plane in 1958 sent shock waves of disbelief through the country.<sup>5</sup> We believed in our institutions, and we thought well of the President and believed what he had to say. “I like Ike” was an appropriate slogan for a country that sat together with their families and watched Fred McMurray in “My Three Sons” or “Leave it to Beaver.” Adlai Stevenson was perfectly gracious and gallant in his unsuccessful quest for the Oval Office. Politics seemed not so nasty. That was when America was more tuned in to “Ozzie and Harriett,” the “Donna Reed Show” and “I Love Lucy” than to Lenny Bruce and Reefer Madness. Kids in trouble meant an illegal six-pack, not an Uzi or a crack pipe. Quaint as it may seem, there was a time, not so long ago, when “60 Minutes” simply meant an hour in the day, not the reporting of yet another scandal befalling corporate, political or legal America.

These related themes—suspicion of power, the primacy of the individual and the culture of scandal—define our life together as a people in large measure in the 1990s (along with themes of inclusiveness, di-

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5. See Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, in *Essays on Espionage and International Law* 3, 17 (Roland J. Stranger ed., 1962); see also James Reston, *U.S. Concedes Flight Over Soviet, Defends Search for Intelligence; Russians Hold Downed Pilot a Spy*, N.Y. Times, May 8, 1960, at 1 (admitting that a plane equipped for intelligence purposes was flying over the Soviet Union). See generally Jef Verschueren, *International News Reporting: Metapragmatic Metaphors and the U-2*, at 33, 41-99 (1985) (analyzing the news coverage surrounding the downing of the U-2).

versity and egalitarianism that are beyond the ambit of my remarks this evening).

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My current role in Little Rock as independent counsel is illustrative of the confluence of these broad social trends. In the aftermath of Watergate, Senator Sam Ervin of North Carolina—who chaired the Senate select committee of the Watergate investigation and who became a folk hero in the mid-1970s—held hearings on whether an *independent* Department of Justice should be established.<sup>6</sup> This proposed independence of our nation’s law department was quite radical. The idea was that the Attorney General of the United States would be like the Chairman of the Federal Reserve Board, independent of the President of the United States. The idea, which was embodied in a piece of proposed legislation,<sup>7</sup> was rejected, but in its place—more modestly—came the Ethics in Government Act of 1978,<sup>8</sup> with its vision of independence. This is the moral vision of the “independent counsel,” or what was once called the “special prosecutor.” It means a prosecutor not appointed by the President or the Attorney General—the model of such memorable examples as Archibald Cox and Leon Jaworski—and who is appointed instead by the courts and who functions independently of the Executive Branch.

Why this independence from the executive branch? Why this independence from the President and any subordinate officer? The idea, again, is mistrust and suspicion of power. Just as no one should be the judge in his or her own case—the theory goes—we should not, as a matter of law, trust anyone appointed by the President or the Attorney General to investigate the President or other high ranking officers of the executive branch who are answerable to the President. We take a page from Lord Acton: “Power tends to corrupt, and absolute power corrupts absolutely.”<sup>9</sup>

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These trendlines are applicable to the courts as well. Judges, like others who wield power, can behave in ways that are viewed by the people as inappropriate or imperious. The great debate that swirls

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6. See *Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974); see also William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 Geo. Wash. L. Rev. 474, 484 (1989) (stating that Senator Sam Ervin proposed an “independent” Justice Department); Jeremy Rabkin, *At the President’s Side: The Role of the White House Counsel in Constitutional Policy*, 56 Law & Contemp. Probs. 63, 78 (1993) (same).

7. See *Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974).

8. 5 U.S.C app. §§ 101-505 (Supp. V 1993).

9. J. Dalberg-Acton, *Acton-Creighton Correspondence, in Essays on Freedom and Power* 357, 364 (G. Himmelfarb ed., 1948).

over *Roe v. Wade*,<sup>10</sup> the issue called right-to-die<sup>11</sup> and the unsettling world of Dr. Jack Kevorkian<sup>12</sup> is about morality, about competing visions of right and wrong, good and evil and differing moral visions about life—when life begins and who controls its termination.

But the debate is also about power and the appropriateness of courts making fundamental decisions about social policy in America. So here ideas and visions clash: Are judges and Justices of the Supreme Court simply protecting individual rights and liberties against majoritarian forces that would oppress or even enslave individuals? Or, on the other hand, are judges abusing their power? Are they usurpers, perhaps pursuing their moral vision of the good society, but in the process tearing at our democratic roots society and the right of the people, through elected representatives, to govern themselves?

Our suspicion of power readily includes judicial power. Courts, by their nature, tend to exalt the individual as against the organized forces of society. They protect individual liberty and dignity interests. This characteristic dovetails with one powerful current in our life as a society. We like the individual and individual rights, and so do courts. But, as to the third broad social current—scandal—the courts, themselves, sadly, have not been free from taint. Before the watershed of Watergate, Justice Abe Fortas resigned in disgrace,<sup>13</sup> and the specter of scandal engulfed Judge G. Harrold Carswell<sup>14</sup> and (in my opinion, unfairly so) Judge Clement Haynsworth.<sup>15</sup> Since that time, with astonishing regularity, sitting federal judges have been indicted, and at times convicted, of serious criminal offenses. More recent confirma-

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10. 410 U.S. 113 (1973).

11. See, e.g., *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (holding that clear and convincing evidence of an incompetent patient's wishes is required for the court to permit the termination of death-prolonging procedures); *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976) (stating that the Supreme Court has recognized the right of privacy, which presumably is broad enough to encompass a patient's desire to decline medical treatment); see also John A. Powell & Adam S. Cohen, *The Right to Die*, 10 Issues L. & Med. 169 (1994) (suggesting that our society continues to struggle with the debate over the right to die).

12. See Powell & Cohen, *supra* note 11, at 172; see, e.g., Dan Colburn, *Debate on Assisted Suicide Gains Steam*, Wash. Post, May 10, 1994, at 8; Jacqueline Weaver, *Reflections on Life and How it Ends*, N.Y. Times, June 5, 1994, at 3.

13. Bruce A. Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 55-77 (1988) (describing Fortas' career on the Supreme Court); *The Supreme Court Justices* 474 (Clare Cushman ed., 1993) (explaining that Fortas resigned from the Court after *Life Magazine* published a story about his involvement with an indicted stock manipulator).

14. See *Nomination of George Harrold Carswell To Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970).

15. See *Nomination of Clement F. Haynsworth, Jr. To Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1970); see also John P. Frank, *Clement Haynsworth, the Senate and the Supreme Court* (1991) (discussing Haynsworth's nomination to the Supreme Court and suggesting that the defeat of his nomination was purely political).

tion battles over various nominees to the nation's highest Court bear witness to scandal engulfing the Article III branch.<sup>16</sup> As I can personally attest, even appointments of independent counsel by a panel of judges, as provided by the Ethics in Government Act, have not been immune from controversy. Evil or improper motives have freely been attributed to judges with exemplary and lengthy records of distinguished service.

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The scathing criticisms of our justice system, including the broadsides against the legal profession itself, can fully be understood only against the backdrop of this broader social and cultural context. But looming large in the criticism of courts and the law, and specifically in lawyers and in the legal profession, are features that are peculiar to the descent of our profession into the lower regions of public disrespect. In particular, our hard, cutting-edge individualism has resulted in a remarkably different litigation culture than the one John F. Sonnett<sup>17</sup> helped to nurture and preserve.

Several years ago, in downtown Los Angeles, the American Bar Foundation presented its fifty-year service award to a remarkable and distinguished practitioner from San Francisco, Moses Lasky. Mr. Lasky, in accepting the award marking his half-century of service to courts, clients and the legal profession, reminisced about his life in the law. Memories of great episodes in life, of relationships with great lawyers of integrity and wisdom, including lawyers of the other side, of teachers and mentors in the law came flooding through.

Then, the tone of the remarks shifted abruptly. Looking back over the span of five decades of law practice, Mr. Lasky suggested that sometime in the mid- to late 1970s, the practice of law changed. It stopped being fun. It became less civil, less genteel and considerably more commercialized.

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It is by no means coincidental that the decline in professional satisfaction within the legal profession, captured by the pointed remarks of Moses Lasky, has been accompanied by growing expressions of disapproval by the American people of our profession and of the justice

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16. *Nomination of Judge Clarence Thomas To Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 36 (1991).

17. John Sonnett, a 1936 graduate of Fordham School of Law, was known internationally as a pre-eminent trial and appellate lawyer. Prior to his death in 1969, Mr. Sonnett was a senior partner at the firm of Cahill Gordon & Reindel. Mr. Sonnett had also served as an Assistant Attorney General and Chief of the Antitrust Division of the United States Department of Justice. During World War II, Mr. Sonnett was special counsel to the Under Secretary of the Navy, and he conducted the final Navy investigations of the attack on Pearl Harbor.

system more generally. Our explosive growth as a profession,<sup>18</sup> in terms of sheer numbers, has placed extraordinary burdens on our now endangered traditions of civility and professionalism. These baleful developments, along with bottom line economic pressures, is a story that is discouragingly familiar to bench and bar and need not be retold here.

In litigation, pretrial discovery is, and has been, the great battlefield. The age of gentility having been replaced by the culture of Jurassic Park,<sup>19</sup> albeit Jurassic park in pin stripes, pitched battles are now waged, in an environment partaking of nonviolent but total war, by litigators and trial lawyers across the country. Zealous advocacy has been replaced by decidedly uncivil "in your face" stratagems designed to browbeat, to demean and to threaten.

How far we have come from the world envisioned by Judge Charles Clark of the Second Circuit, who served on the great court of Learned Hand and who was a primary architect of modern pretrial discovery.<sup>20</sup> That world was one of rationality, of informing parties to civil litigation of their respective strengths and weakness through pretrial discovery. Through such now-familiar devices as written interrogatories, requests for production of documents and depositions of witnesses, including experts, parties would be able to come to grips with the realities of a case before the jury was in the box and society was put to the expense of a trial on the merits.<sup>21</sup> Discovery, then, was the great innovation to modernize, to streamline and to rationalize litigation and thereby to make the dispute resolution process less reliant on the courtroom cunning of skilled trial lawyers.

As years went on, discovery the solution, discovery the civil reformer's dream became discovery the problem, discovery the nightmare.<sup>22</sup> From the shock of the activity of the defense counsel in the *Kodak*<sup>23</sup> case, to the swirling controversy over the conduct of the Seattle law firm of Bogle & Gates,<sup>24</sup> to the deposition techniques of

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18. In 1979, 57,676 people across the country took the bar examination. See *The Lawyers Almanac* 1981-82, at 284-85 (1981). In contrast, in 1992, 72,461 people across the county took the bar examination. See *The Lawyers Almanac* 1994, at 724 (1994).

19. Jurassic Park (Universal 1993).

20. Judge Clark was the Reporter to the original Federal Rule drafting committee. Jack B. Weinstein, *After 50 Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. Pa. L. Rev. 1901, 1903-04 (1989).

21. See generally William A. Glaser, *Pretrial Discovery and the Adversary System* 9-12 (1968) (setting forth the aims of discovery, including to diminish the amount of trickery embedded in our legal system and to reduce the number of cases that go to trial).

22. See Theodore Y. Blumoff et al., *Pretrial Discovery: The Development of Professional Judgment* § 2.1, at 9-12 (1993).

23. See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 615 (S.D.N.Y. 1977).

24. See *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1074-79 (1993) (holding that trial court should have sanctioned the defendant or

Houston's legendary Joe Jamail,<sup>25</sup> a growing sense of disquiet and unease was spreading over lawyer behavior and law firm behavior. The ideal of Atticus Finch, the courageous lawyer carrying out an unpopular assignment with grace and dignity, was jettisoned and replaced by what judge after judge came to view as *lawyer as Rambo*, seen in courts across the country every day.

Two years ago, a very prominent and highly successful trial lawyer made a presentation for a group of litigators about how to conduct oneself in pretrial discovery.<sup>26</sup> In his Hobbesian world, litigation was simply a jungle. In his sinister world, the other side was not only not to be trusted, but just the opposite. The other side would deliberately deceive; they would improperly withhold or would fail to respond.

What to do? The lawyer advised his fellow lawyers as follows: "The answer is obvious: Be unreasonable. If you are unreasonable, the Judge will give you what you want."<sup>27</sup>

The trial lawyer went on to urge planning in advance, to anticipate that the other side would be obstreperous. Thus, he suggested: "You know what is coming when you are seeking discovery. Go ahead and prepare a draft motion to compel," he urged his listeners. "Try to develop evidence of slowness in response, bring this promptly to the judge's attention, and then try to get a default judgment entered against the other side."

This pattern is now a standard part of the modern litigator's play book. It emphasizes attacks, presuming bad faith on the other side, immediate repairing to the trial judge with a laundry list of litigation sins by one's opponent and seeking the imposition of severe sanctions, including entry of default judgment.

This brass-knuckles approach to litigation is now commonplace. In its most pathological form, it has come to have a name of its own—the *sanctions tort*.<sup>28</sup> Using sanctions prematurely, at times on the heels of wildly overbroad discovery requests, including requests for attorney-client privileged material or attorney work product, which of course enjoy fundamental protection in our law,<sup>29</sup> the trial becomes one fo-

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the defendant's attorneys for discovery abuse); Sharon Walsh, *State Court Sanctions Firm for Failure to Disclose*, Wash. Post, Nov. 29, 1993, § f (Financial), at 7.

25. See *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 51-57 (Del. 1993) (discussing Jamail's misconduct with respect to discovery in an addendum to the opinion); Excerpts: *A Delaware Court Criticizes Deposition Behavior of Attorney*, Nat'l L. J., Feb. 21, 1994, at 22.

26. See James E. Butler, Jr. & Patrick A. Dawson, *The Bench as Battleground: The Discovery Process is Broke and Only Judges Can Fix It* (1992).

27. *Id.* at 4-5.

28. See, eg., Charles F. Herring Jr., *The Rise of the Sanctions Tort*, Tex. Law., Jan 28, 1991, at 22 (describing the sanctions tort as a "whole new arena of outcome-determinative pretrial gamesmanship").

29. See Model Rules of Professional Conduct 1.6 (1983); Model Code of Professional Responsibility DR 4-101(B) (1980).

cused on the party's conduct and on the conduct of the party's counsel.

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This is a new age of barbarism, and it is increasingly the order of the day. What drives this new age of barbarism is not unrelated to the themes articulated earlier—our aggressive individuality, or breaking bonds of professional community through an exaltation of the individual scrapping to get his or her way and achieve his or her goals, and, finally, the culture of scandal. It is the same value system in modern civil litigation as that undergirding negative advertising in politics. Do not debate the merits of issues; do not engage in the genuine clash of ideas. Manipulate, distort and hopefully destroy. And in extreme situations, engage in character assassination. As in politics, the law and the legal profession have been demeaned and demoralized quite seriously in the eyes of the public.

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This new age of litigation barbarism is most frightfully evident in the super-high stakes world of modern tort law. Tort litigation now means go-for-broke Rambo discovery tactics in this demoralized world now full blown upon us.

The engine driving the demonic machine is very simple to identify—dollars, very big dollars. It is the crassest, most greedy, avaricious dimension of the fearsome commercialization of the legal profession. Gun-slinging competition is continually under way for the title, King of Torts, carrying with it not only fame and prestige but income levels that would impress even the partners of Goldman Sachs.<sup>30</sup> One trial lawyer now seeking federal elective office listed his earned income for the past twelve months as \$12 million,<sup>31</sup> and this is a trial lawyer who has never had his trials on Court TV or featured in the National Law Journal. He is just a middle-class trial lawyer.

The astronomical, mind-boggling levels of income are traceable to one primary source—the modern day phenomenon of punitive damages. Modern day punitive damages is the modern day lottery—not many winners, but a legion of wannabe winners who are competing vigorously in courtrooms across America. These are damages designed not to compensate an injured victim, but to punish and to deter antisocial conduct. As every first-year student learns, the purpose of damages in our civil law is to *compensate*, to make whole. Volume 2 of Blackstone's ancient commentaries<sup>32</sup> makes the point powerfully. The *criminal* nature of punitive damages, until recently, made scholarly commentators and defense attorneys uneasy. No

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30. See Gary Taylor, *O'Quinn Shoots for 'Tort King' Crown*, Nat'l L. J., Oct. 17, 1994, at A1.

31. The attorney referred to is C. Fredrick Overby, a partner in the firm of Butler, Wooten, Overby & Chelley with offices in Atlanta and Columbus, Georgia.

32. 2 William Blackstone, Commentaries \*396.

lesser light than Prosser in his *Law of Torts* politely called punitive damages in the civil law “rather anomalous.”<sup>33</sup> Indeed, our Yankee forebears in New Hampshire said over a century ago that it is difficult on principal to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more.<sup>34</sup> This from a New Hampshire Supreme Court opinion in 1873.

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Punitive damage awards have become such a commonplace occurrence—albeit, so as not to overstate, not a daily occurrence—that we are no longer taken back by news of an award in the many millions, or even billions of dollars. It bears noting, however, that this is, all things considered, quite new, even though the concept of punitive damages is ancient in our law.<sup>35</sup> Indeed, statistics show that “hit-the-jackpot” levels of awards are quite novel.

A brief historical note:

A recent study found that the largest punitive damages award in the nineteenth century—including verdicts set aside as excessive by reviewing courts—was a modest \$4,500.<sup>36</sup> Translated into our cheapened coin of the realm, that is \$58,000 in modern-day dollars.<sup>37</sup>

But if that seems like the unenlightened bad old days, as of 1955—when Adlai Stevenson was preparing a second time to square off against “I Like Ike”—the largest punitive damages award in the history of California was \$75,000.<sup>38</sup> The movement towards large awards got under way in the 1960s and then took off on size in the 70s and 80s.

This, ironically, has come at a time of considerable regulatory activity and the growth of the modern administrative and regulatory state. That is, at a time when avenues of marketplace regulation at various levels of government, the need for common law instruments—through litigators on a case-by-case basis—would seem to have declined. There is, at least in theory, less of a gap than in the nineteenth century in terms of disincentives to engage in outrageous and wanton misconduct.

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What flows from all of this? In my view, it is time to get at one of the root causes of that which is wrong with our life together as a profession. It is time to think the heretofore unthinkable and to reexam-

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33. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 2, at 9 (5th ed. 1984).

34. *Fay v. Parker*, 53 N.H. 342, 343 (1873).

35. See Gerald W. Boston, *Punitive Damages in Tort Law* § 1.2, at 2, §§ 1.7-1.10, at 11-16 (1993).

36. Brief of the American Institute of Architects et al. at 14, *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (No. 89-1279) (citing *New Orleans, J. & G.N.R.R. v. Hurst*, 36 Miss. 660 (1859)).

37. *Id.*

38. *Id.* at 16.

ine the modern institution, by abolishing punitive damages. On reflection, it will be seen that this is not so unthinkable after all.

Several states—Michigan,<sup>39</sup> New Hampshire,<sup>40</sup> Nebraska<sup>41</sup> and Washington<sup>42</sup>—do not have punitive damages. Yet, life seems to go on. And, despite their origins in ancient English case law, the law in England, upon close analysis, never evolved to the point, as in the United States, of accepting punitive damages that are expressly designed to do more than compensate.<sup>43</sup> And, as illustrated by *Rookes v. Barnard*,<sup>44</sup> a House of Lords decision from thirty years ago, punitive damages are generally prohibited at modern English common law.

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Abolishing punitive damages would be an important, non-tinkering step toward real reform in the law and in the profession. It would also be consistent with one of the bedrock concerns articulated at the outset of these remarks—the problem of power. Cutting across various philosophical and ideological lines, virtually every Justice on the Supreme Court in recent years, including Justice Brennan,<sup>45</sup> Justice Marshall,<sup>46</sup> Justice Blackmun<sup>47</sup> and, most recently, Justice Souter,<sup>48</sup> has expressed grave concern about runaway punitive damages

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39. See *Fellows v. Superior Prods. Co.*, 506 N.W.2d 534, 536 (Mich. Ct. App. 1993) (“In Michigan, the courts of that State refuse to allow the recovery of punitive damages.”) (citations omitted).

40. See *Panas v. Harakis*, 529 A.2d 976, 986 (N.H. 1987) (“This jurisdiction forbids the award of punitive damages.”) (citing *Fay v. Parker*, 53 N.H. 342, 382, 397 (1873)).

41. See *Braesch v. Union Ins.*, 464 N.W.2d 769, 777 (Neb. 1991) (“[P]unitive damages are not allowed in Nebraska . . . .”) (citing *Abel v. Conover*, 104 N.W.2d 684, 686 (1960)).

42. See *Kennewick Educ. Ass’n v. Kennewick Sch. Dist. No. 17*, 666 P.2d 928, 930 (Wash. Ct. App. 1983) (“It has long been established that recovery of punitive damages is contrary to the public policy of the State and will not be allowed unless expressly authorized by statute.”); see also *Spokane Truck & Dray Co. v. Hoefler*, 25 P. 1072 (1891) (prohibiting punitive damages).

43. See *Boston*, *supra* note 35, §§ 1.3-1.6, at 2-10.

44. 1 All E.R. 367 (1964).

45. See, e.g., *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281-82 (1989) (Brennan, J., concurring) (expressing concern that “punitive damages are imposed by juries guided by little more than an admonition to do what they think is best”). In *Browning-Ferris*, Justice Brennan suggested stricter scrutiny of punitive damages awards in cases where there is no statute to guide the jury’s decision. *Id.* at 281.

46. See, e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 80-86 (1971) (Marshall, J., dissenting) (discussing the negative effect of punitive damage awards on freedom of the press).

47. See, e.g., *Pacific Mut. Life Ins. v. Haslip*, 499 U.S. 1, 18 (1991). In *Haslip*, Justice Blackmun, writing for the majority, stated: “We note once again our concern about punitive damages that ‘run wild.’” *Id.*

48. See, e.g., *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2742 (1993) (O’Connor, J., dissenting). In *TXO*, Justice Souter joined in Justice O’Connor’s dissent in which she expressed concerns with skyrocketing punitive damage awards. *Id.*

awards.<sup>49</sup> That should go a long way toward establishing a moral consensus.

But the issues about competitiveness and other potential effects on our economic life will continue to spawn debate among economists. What should be clear, however, is that we need to think rather creatively about how to abate the trend toward scorched earth, highly destructive and extremely high stakes litigation that is so demeaning and demoralizing to officers of the court. The old fashioned virtues in law of honor, integrity, zealous advocacy and respect for the other side and of the good faith of the other side is what John Sonnett stood for. It is these values that, in our own way, we should pursue in the memory of the great man whose contributions to this institution and to the courts of law we celebrate tonight.

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49. See generally *Haslip*, 499 U.S. at 9 (“This Court and individual Justices thereof on a number of occasions in recent years have expressed doubts about the constitutionality of certain punitive damage awards.”).

